

ISSUES

The respondent appeals from an award of penalties. The order dated, July 1, 1994 requires respondent to pay \$100.00 per week beginning April 7, 1994 and continuing until temporary total disability payments are current.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the record and consideration of the arguments by the parties the Appeals Board finds, for the reasons stated below, that the Award of Penalties is appropriate but should be modified to require payment of \$100.00 per week beginning June 2, 1994 rather than April 7, 1994.

Respondent first argues that penalties cannot be assessed until a final award is entered. However, the Kansas Court of Appeals has approved penalties for failure to pay preliminary orders in *Stout v. Stixon Petroleum*, 17 Kan. App. 2d 195, 836 P.2d 1185, Rev. Den. 251 Kan. 942 (1992). In addition, an award of penalties is considered subject to appeal as a final award. See *Harvell v. Superior Industries International, Inc.*, Docket No. 176,051 (December 1993).

Respondent next argues, in effect, that it should not be penalized for failure to pay temporary total benefits because temporary total benefits were not ordered. On March 28, 1994 the Administrative Law Judge entered an order following preliminary hearing requiring respondent to furnish medical treatment and temporary total disability benefits if the authorized physician takes the claimant off work. Following that hearing Dr. Carabetta was selected as the authorized physician. He examined claimant and issued a report dated May 13, 1994 which, among other things, recommended work restrictions. That report did not expressly state whether Dr. Carabetta intended to take claimant off work. A letter of clarification was sent to claimant's attorney on May 19, 1994 stating:

"As per discussion today, my impression is that if indeed I would have had the opportunity to see Claud Williams following his work injury of 11-24-93, I would likely have taken him off work at that time while appropriate aggressive therapy could have been pursued..."

It should be noted that at the time Dr. Carabetta saw claimant and at the time he wrote the clarifying letter, the claimant was already off work because of an unrelated carpal tunnel condition. The carpal tunnel had reached maximum improvement so that claimant was not considered entitled to temporary total benefits because of the carpal tunnel. Nevertheless, the condition prevented his return to his regular employment.

Respondent did not, in response to the letter from Dr. Carabetta, commence temporary total disability payments. The claimant then filed a demand for compensation and after the twenty (20) day waiting period, applied for penalties. At the hearing on the application for penalties the Administrative Law Judge assessed penalties in the amount of \$100.00 per week beginning April 7, 1994, ten days after the original order for medical and temporary total benefits.

The Appeals Board first finds that the letter of May 19, 1994 was adequate, especially in conjunction with the work restrictions recommended, to notify respondent that

the doctor believed claimant should be off work. Dr. Carabetta was, at the same time, recommending the therapy which his letter indicated should have been ordered at an earlier date. Respondent apparently did nothing in response to the doctor's letter. The Appeals Board agrees with the implicit holding in the Administrative Law Judge's order for penalties that this letter did in fact take claimant off work.

Respondent also suggests, as justification for not paying temporary total benefits, that respondent did not know what date payment should begin. Claimant had not worked since January 13, 1994 when his employment terminated due to restrictions recommended because of the carpal tunnel condition. The Appeals Board does not consider this uncertainty about when to start to be justification for not starting at all. In this case the Appeals Board believes that the temporary total benefits should be considered to commence the date of the Application for Preliminary Hearing. Pursuant to K.S.A. 44-534a, a preliminary order begins temporary total benefits as of the date of the application, in this case on January 31, 1994, unless the Administrative Law Judge expressly uses some other date. The order does not expressly award any benefits prior to that date and accordingly should be understood as an award for benefits from the date of the Application only. Consequently a payment of temporary total benefits beginning the date of the Application for Preliminary Hearing will be considered to bring the temporary total benefits current as required by the order of the Administrative Law Judge.

The Appeals Board does however, consider it appropriate to modify the date for commencement of penalties. The Administrative Law Judge's order begins the penalties ten days from its original order as previously approved by this Board. See Livers v. Trans Union Corporation, Docket No. 162,178 (May 1994). Nevertheless, in this case it seems more appropriate that the penalties not begin until the physician has indicated that the claimant should be taken off work. Prior to that date the respondent had no obligation and benefits therefore, could not be considered past due. It is unclear when the second letter from Dr. Carabetta was provided to the respondent's attorney. It is dated May 19 and addressed to the claimant's attorney with no indication that a copy was sent to the respondent's attorney. The Appeals Board therefore considers it more appropriate to use the date of demand for compensation. It seems apparent that respondent had notice as of that date, if not earlier. The demand for compensation is also not dated but is shown to have been received by the Division of Workers Compensation on June 4, 1994. That date will therefore be used for commencement of penalties.

In summary, penalties are ordered at the rate of \$100.00 per week commencing June 4, 1994 until temporary total benefits are brought current. Temporary total benefits are considered to be brought current when paid from date of the application for preliminary hearing.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeal Board that the order of Administrative Law Judge John D. Clark be modified to order payment of penalties of \$100.00 per week for each week beginning June 4, 1994 until temporary total benefits are brought current.

IT IS SO ORDERED.

Dated this ____ day of October, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: William L. Phalen, Attorney at Law, PO Box 1346, Pittsburg, KS 66762
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John D. Clark, Administrative Law Judge
George Gomez, Director